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No. ~~299~~ 304

IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

UNITED STATES OF AMERICA, *Petitioner*
v.
GERLACH LIVE STOCK COMPANY, A CORPORATION

UNITED STATES OF AMERICA, *Petitioner*
v.
J. SHELDON POTTER

UNITED STATES OF AMERICA, *Petitioner*
v.
MARTIN ERRECA

UNITED STATES OF AMERICA, *Petitioner*
v.
JAMES J. STEVINSON, A CORPORATION

UNITED STATES OF AMERICA, *Petitioner*
v.
ARCHIBALD J. STEVINSON

UNITED STATES OF AMERICA, *Petitioner*
v.
3-H SECURITIES COMPANY

On Writs of Certiorari to the Court of Claims

BRIEF FOR GILL, ET AL., AMICI CURIAE

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BRIEF FOR GILL, ET AL., AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are plaintiffs in four cases pending in the Court of Claims: *Gill* v. *United States*, No. 48817, *Arnold* v. *United States*, No. 48818, *Buchenau* v. *United States*, No. 48821, and *Thompson* v. *United States*, No.

48822. Those cases present issues in most respects identical and in all respects similar to those now before this Court. The Solicitor General, by letter of January 24, 1949, and counsel for the respondents, by formal consent received January 21, 1949, have consented that this brief *amicus curia* be filed; those documents have been deposited with the Clerk.

OPINIONS BELOW

The opinion of the Court of Claims overruling a demurrer is reported in 102 C. Cls. 392, and its opinions after trial (R. 130, 191) in 76 F. Supp. 87, 99.

JURISDICTION

Judgments in Nos. 302-304 were entered on March 1, 1948 (R. 192) and a motion for new trial denied on June 1, 1948 (R. 193). Mr. Justice Jackson on August 20, 1948, extended the time in which to file a petition for writs of certiorari to and including September 28, 1948 (R. 193). Judgments in Nos. 299-301 were entered on April 5, 1948 (R. 146-147) and a motion for new trial denied on June 28, 1948 (R. 147). A petition for writs of certiorari was filed on September 24, 1948, and was granted on December 6, 1948. The jurisdiction of this Court rests on 28 U. S. C. sec. 1255.

QUESTIONS PRESENTED

1. Whether the reclamation laws and the Central Valley Project legislation contemplate the purchase or the uncompensated seizure of the riparian rights to the irrigation use of the waters of the San Joaquin River which were taken by the United States for the purpose of sale for the irrigation of non-riparian lands.

2. Only if the first question be answered against the respondents, does the Court reach the major issues presented by the Solicitor General:

(a) Whether Friant Dam, Millerton Lake, and the Friant-Kern and Madera Canals were authorized and constructed in order to irrigate non-riparian lands or to aid navigation and commerce.

(b) Whether the Government may seize the riparian rights to the irrigation use of navigable waters in the arid states, for the purpose of sale for the irrigation of non-riparian lands, without the payment of just compensation.

3. Whether the court below erred in fixing October 20, 1941, as the date of the taking.

4. Whether the riparian rights to irrigation by the overflow waters of the San Joaquin River were destroyed by Section 3 of Article XIV of the California Constitution, adopted in 1928.

5. Whether the deed, from Miller & Lux, Inc. to Gerlach Live Stock Co. and Martin-Erreca (Nos. 299, 301) gave the grantees riparian rights which were protected against their subsequent sale to the United States by the grantor.

Amici curiae have no interest in the remaining questions presented by the Solicitor General: the effect of the Miller & Lux deeds involved in Nos. 300, 302-304, and the comparative particularity of the findings of the Court of Claims in the cases at bar.

STATUTES INVOLVED

Section 8 of the Reclamation Act and the Acts of August 26, 1937, and October 17, 1940, are set out in the Government's Brief (81, 4, 6).

STATEMENT

1. The Project. The Central Valley of California reaches from Redding in the north to Bakersfield 400 miles to the south. Its main water-courses are the Sacramento and the San Joaquin Rivers which flow together a few miles east of Suisun Bay, the northeastern part of the Bay of San Francisco. Both rivers are here assumed to be navigable. The Sacramento River carries about twice the water volume of the San Joaquin, and the San Joaquin Valley contains about twice the irrigable land found in the Sacramento Valley.[1] The grand purpose of the Central Valley Project is to transfer the excess water of the Sacramento to the southern part of the Central Valley.[2]

Both the United States and the State have for a very long time been engaged in investigation and planning for the Central Valley improvements. After a series of detailed studies and investigations by state and Federal agencies, the State enacted the Central Valley Project Act of 1933, calling for state construction of the project, with federal aid. Cal. Stats. 1933, p. 2643.[3] The State was not successful, however, in obtaining a grant from the Public Works Administration and in May 1935 the Bureau of Reclamation applied for an allotment for a federal project under the Emergency Relief Appropriation Act of 1935; this was made in September 1935.[4]

The decision in *United States* v. *Arizona*, 295 U. S. 174, cast considerable doubt on the validity of commencing the work under an F. E. R. A. allocation and the project was accordingly authorized under the federal reclamation laws

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[1] Central Valley Federal Reclamation Project, Feasibility Report of Secretary of Interior, H. Doc. No. 146, 80th Cong., 1st sess., p. 8.

[2] *Ibid.*, p. 2.

[3] See Montgomery and Clawson, History of the Central Valley Project (U. S. Dept. of Agriculture, Bur. of Agric. Econ., Berkeley, Cal., 1946), pp. 9, 21-37, 46-64, 270.

[4] *Ibid.*, pp. 71-81.

by letter of the Secretary of the Interior, dated November 26, 1935, approved by the President on December 2, 1935 (R. 91-93; Rsp. Br. App. i-x). In order to accomplish a transfer of funds from the Corps of Engineers, the project was reauthorized under the reclamation laws by the Act of August 26, 1937. This Act was in turn amended, in respects not important here, by the Act of October 17, 1940.

The project in its present form rests upon the Shasta and Friant dams. Shasta Dam and Reservoir (aided by the re-regulating dam and reservoir at Keswick) will regularize the flow of the Sacramento, thus aiding navigation and salinity control, and will produce large amounts of electric power. The Delta Cross-Channel will carry the excess water of the Sacramento to a point on the San Joaquin near Tracy, south of Stockton. From there it will be pumped through the Delta-Mendota Canal to Mendota and released down the San Joaquin. This transfer makes possible the use of the San Joaquin waters to irrigate other lands. Accordingly, Friant Dam and Millerton Lake have been constructed at Friant, where the San Joaquin flows into the Central Valley. The dam will impound substantially the entire flow of the San Joaquin and divert it into the Madera Canal (1500 cfs), running 37 miles northwest toward Merced, and into the Friant-Kern Canal (4000 cfs), running 160 miles southeast to Bakersfield and the Kern River.[5] The 40-mile stretch of the San Joaquin between Friant and Mendota will be dry except for occasional spillages needed to provide flood control storage (R. 91-94).

The project from its beginning has contemplated the replacement or purchase of the appropriative and riparian rights along the San Joaquin which would be destroyed by the impoundment and diversion at Friant Dam. Beginning in the summer of 1939 the United States, through

[5] See Central Valley Reclamation Project, *op. cit.*, n. 1, pp. 12-14

the Bureau of Reclamation, has made extensive purchases of these riparian rights. (See *infra*, pp. 29-33).

Construction of Friant Dam commenced on November 3, 1939 (R. 99). No substantial impoundment of the water occurred until October 20, 1941, when the flow of the river was cut off for three weeks and 17,400 acre-feet impounded (R. 100-101). In the winter of 1942 a temporary impoundment resulted from the fact that a high flow of water exceeded the capacity of the dam outlets (R. 101). The Madera Canal was completed in 1944 and storage sufficient to raise the water to its outlet (at 140.4 feet) commenced on February 21, 1944; some 302,600 acre-feet were impounded for the purpose (R. 99, 101). In 1945 the reservoir level was raised to the base of the drum-gates (at 254.4 feet); the total impoundment was then 430,000 acre-feet (R. 99, 101). The drum-gates have not yet been installed, and the Friant-Kern Canal has not yet been completed; no diversions have yet been made into that canal (R. 102).

2. The Lands. Most of the lands involved in these cases border on the main channel of the San Joaquin and all lie within its flood-plain. They are grass lands, used for pasture. There is no controlled irrigation of these lands, but they have been moistened and enriched by the spring over-flow of the San Joaquin (R. 71, 73, 87-88, 110, 113, 127, 161-163, 172-173, 188-190). The rights to this ordinary overflow water are riparian rights, and as to three of the cases have so been adjudicated and protected by a state court decree of 1933[6] (R. 79-81, 108-110, 112-113, 126-127). The riparian rights have a value of $9.00 an acre (R. 96, 110, 113, 128, 188, 190, 191).

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[6] The decree allowed the Madera Irrigation District only the infrequent, extraordinary and unusual flood waters, defined to be those in excess of 20,000 second-feet or 3,000,000 acre-feet per year. The annual overflow on the riparian lands here involved is accomplished by water volumes of a much smaller magnitude (R. 71-72, 81, 85).

The impoundment of October 21, 1941, did not deprive any of these lands of waters which they would otherwise have received (R. 119, 127, 188, 190). The court below made no finding as to the effect upon these lands of the 1942 and 1944 impoundments nor of the continuing operation of the Madera Canal. The lands will not receive any over-flow waters after the Friant-Kern Canal is completed and put into operation (R. 110, 113, 127, 188-189, 190).

The lands of two of the six respondents before this Court (Gerlach Live Stock Co., Erreca, Nos. 299, 301)[7] were purchased from Miller & Lux, Inc. through deeds dated June 20, 1935, and October 20, 1937; each provided (R. 111-112, 125-126):

> * * * the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River * * *. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor * * * against the Grantee * * * to the extent herein provided.

Whatever the meaning and effect of this clause, there was not in fact any possibility that Miller & Lux could use water on its uncontrolled grass lands in such a way as to reduce that available to the respondents (R. 90). There is no evidence of use or plans by any other riparian owner which would affect the rights of the respondents (R. 89).

3. **The Litigation.** The Commissioner of Reclamation in 1939 offered assurance that "the policy of the Gov-

[7] *Amici curiae* have no interest in the sources of title of the other four respondents.

ernment is to compensate equitably those whose property rights will be adversely affected as a result of the construction of Friant Dam" (Rsp. Br., App. xvi). Promptly after approval of the plan an appraisal board was appointed which fixed the value of the water rights of Miller and Lux grasslands at $13 an acre for controlled irrigation and $9 an acre for overflow irrigation. (R. 95-96). The attorneys for the Bureau of Reclamation appear to have accepted, with precautionary reservations, the claim of Miller & Lux that it had the right under the above-quoted clause, to sell for its own account the riparian rights of the Gerlach and Erreca lands. On July 27, 1939, the United States and Miller & Lux entered into a contract by which: (a) the United States agreed to supply agreed quantities of water to replace the controlled irrigation water used on Miller & Lux crop lands; and (b) the United States paid $2,450,000 for a conveyance of the grassland water rights, used in both controlled and overflow irrigation. (R. 95-96). These rights included the riparian rights of the Gerlach and Erreca lands (R. 97). The contract, however, placed $511,350 of the purchase price in escrow, to reimburse the United States (R. 96-97)—

> In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters * * * wherein it is adjudged that the owners of the lands * * * are * * * deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor * * *

The contract places the United States under a duty to defend any suit and to appeal from any adverse judgment (Rsp. Br., App. xiv). There is no indication in the contract that the United States would recover back any part of the $1,938,650 it has already paid Miller & Lux if it should prevail on the arguments it is now advancing to this Court.

Since the Government thought that the riparian rights in issue had already been paid for, three of the respondents were forced to bring suit in the Court of Claims. The Government and the other three respondents could not agree on the value of their rights. On October 30, 1943, the petition in the Gerlach Live Stock case (No. 299) was filed (R. 1). The Government withdrew its general traverse and on February 17, 1944, filed a demurrer (R. 9); its argument in support took the position that as the San Joaquin River was navigable the Government could take riparian irrigation rights to its waters without compensation. The demurrer was overruled (R. 10). Thereupon a general traverse was filed by the Government and the other petitions before this Court were filed and traversed (R. 10, 18, 26, 43, 52, 148, 154, 157, 160).

The Court of Claims, after trial and special findings of fact, held: (a) The purpose of Friant Dam and the diversions of the San Joaquin waters was to irrigate non-riparian lands and not to aid navigation (R. 130-132); (b) the respondents had riparian rights which were confirmed by the California courts, left intact by the 1928 amendment to the state constitution, and taken by Friant Dam (R. 132-133, 138-141, 191); (c) Miller & Lux did not in its deeds reserve the right to sell these rights (R. 133-138); (d) the rights were taken as of October 20, 1941, when the first substantial impoundment of San Joaquin waters occurred (R. 141-145, 191); (e) the rights taken by the United States were worth $9 an acre (R. 145-146, 190-191). Motions for new trial were denied (R. 147, 193) and a timely petition for writs of certiorari granted.

SUMMARY OF ARGUMENT

I

The Government has never before argued in this Court that its powers over navigable waters include the power to destroy, without compensation, vested water rights

necessary for the irrigation of arid lands. We believe the contention could have been raised in more propitious circumstances. However this may be, the Congress has required that these water rights be bought, not seized, and the court does not reach the constitutional issues on which the Government obtained the writs of certiorari.

II

The Central Valley Project is being constructed under the reclamation laws, and is governed by Section 8 of the Reclamation Act of 1902. That section expressly protects water rights which are vested under state law. Its legislative history shows that this was a cardinal, and unchallenged, feature of the reclamation program which Congress was inaugurating. The decisions of this court have frequently recognized the force of Section 8, without regard to whether the stream is navigable or non-navigable.

The Central Valley Project, both in its administrative and in its legislative authorizations, called for the purchase and not the seizure of the San Joaquin water rights here in issue. The Department of Interior has already paid more than $5,000,000 for these water rights. It advised the Congress of its water rights purchase program in each of 12 years and requested and received funds for that purpose in each of 11 years. This was done as early as 1936 and as recently as 1948. As the Department of the Interior said, in 1945, with particular respect to the Central Valley, "The Bureau of Reclamation fully recognizes and respects existing water rights established under state law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure."

Whether or not, ther, the Constiution would require just compensation for the taking of these rights,

the Congress has declared that they should be paid for. The Court of Claims has jurisdiction to enter a judgment based upon this statutory promise, as claim arising either under a "law of Congress" or on a contract implied in fact.

III

As there is a clear statutory promise to pay just compensation for the riparian rights here in issue, the court does not reach the question whether there is also a constitutional promise. We discuss it, however, if only to explain the reasons for the statutory promise.

The navigation immunity in eastern waters does not mean that the Fifth Amendment is inapplicable, but merely that there is no property right, as against the Government's navigation powers, in the flow or the bed of a navigable stream. But the Congress has ever since 1866 recognized and protected the water rights which are necessary to existence on and the productivity of the arid lands of the west; this brief collects more than a score of such statutes. Among these is the Flood Control Act of 1944, which subordinates navigation work to the irrigation use of the waters. That Act covers nine projects in the San Joaquin basin, and acceptance of the Solicitor General's argument would have the paradoxical result of subordinating irrigation rights to a fictitious navigation purpose of an irrigation project while at the same time and in the same basin the Congress has subordinated purely navigation and commerce work to irrigation uses.

Wholly apart from this, the Government can prevail only if the water rights were taken for a navigation, or at least a commerce, purpose. They obviously were taken for no such purpose, but for sale to others for use in nonriparian lands. No part of the work on the San Joaquin will improve its navigability, or contribute in either a physical or a financial manner to the navigation improvement of the Sacramento River. The incidental flood con-

trol benefits of Friant Dam go almost entirely to crop lands, and the most generous possible estimate indicates that the estimated cost of $157,000,000 will produce only about $7500 a year of flood protection benefits to instrumentalities of interstate commerce. It therefore seems to us too plain for serious argument that respondent's rights were taken for irrigation and not navigation or commerce purposes. They were, therefore, compensable even under the cases involving eastern waters.

IV

The Solicitor General does not deny that the riparian right to the annual overflow of the San Joaquin waters was, prior to 1928, a vested and fully protected right under California law. He urges, instead, that a 1928 amendment to the California Constitution destroyed this right because it is a "wasteful" use of the water. But the California courts have settled this issue. The 1928 amendment eliminated the absolute protection which had been given riparian rights which were of no practical benefit to the riparian lands; it also eliminated the riparian power to enjoin the appropriation of water for a more beneficial use, but only if the appropriator replaced or paid compensation for the water which had actually benefited the riparian lands. The California Supreme Court has in 1933 recognized and protected the riparian rights to the San Joaquin overflow and the very rights here in issue were confirmed by a Superior Court decree in 1933. Even if the law were otherwise, the Court will note that the Government has not met the burden required by the California courts of showing that, as against respondents' use of the water, the appropriation will not be injurious. And here, just as with the Government's constitutional argument, it is plain that both the Congress and the agency charged with the administration of the project have determined that the rights in issue are compensable.

The one point in his extended and able argument where we consider the Solicitor General to be in agreement with either the Congress or the Department of the Interior is that of the construction of the Miller & Lux deeds to the respondents. This brief is directed only to the water rights clause in Nos. 299 and 301. The text of that clause—in its contrast between the "riparian" rights of respondents and the "water" rights of the grantor, and in its failure to include the "assigns" of the grantor—makes plain that Miller & Lux reserved no power to sell the riparian rights of the respondents, which rights were expressly declared not to be extinguished. The clause, when read against the background of California law, was simply intended to estop the respondents from exercising the ordinary powers of a riparian owner to object if the grantor chose to store its own water or to divert it to other lands. Most certainly, every presumption is to be exercised against a result so extraordinary as that which would give to Miller & Lux a floating power to sell for its own account the riparian rights which were a part and parcel of respondents' lands. Finally, as the court below held, the deed — whatever water rights it sought to cover — reserved only the right to store, and not to store and to divert to nonriparian lands.

V

The project was authorized in 1935 and the final injury to respondents' lands will not occur until 1950 or 1951. There are, in this 15 year period, a considerable number of dates which may be selected as the time of taking with the support both of respectable precedent and of reason. The court below and the Government itself, in its Miller & Lux contract, chose the date of first storage in October 1941. *Amici curiae* prefer the date of first storage for purposes of diversion, in February 1944. However this may be, *United States* v. *Dickinson*, 331

U. S. 745, seems to make plain that, when the Government chooses not to condemn, any reasonable date in the course of a continuous taking can be selected for purposes of computing interest. When the Government has contracted to buy, from the wrong person, the very rights here in issue as of July, 1939, and has made very substantial payments at that time, it cannot very gracefully complain that the court below has awarded the rightful owner interest since October 1941.

ARGUMENT

I

INTRODUCTION

This Court granted the petition for writs of certiorari to review interesting and wholly novel questions of constitutional law. We do not believe those issues can be reached in this case.

For about three quarters of a century not only the 17 western states but also the Congress have recognized that the irrigator's water right is fully as important and fully as deserving of protection as the uplands of the eastern landowner. For nearly half a century the reclamation laws, under which the respondents' water rights were taken, have placed the Government under a duty to compensate any irrigator whose water rights are taken. For more than a decade the Central Valley legislation has so decreed with respect to the very water rights here involved. The administrative practice of purchasing these water rights has been uniform and has repeatedly been disclosed to and ratified by the Congress.

The Government, before this litigation, has never urged to this Court that the powers of the United States over navigable waters include the power, for any purpose, to destroy vested water rights which are necessary to the irri-

gation of arid lands.[8] We do not believe that these cases present the most appealing circumstances in which to present such a contention.

1. The respondents' water rights are not being taken to improve navigation or to protect commerce. They are being taken for the purpose of sale by the United States for irrigation uses on nonriparian croplands.

2. The water rights are being taken when both Congress and the Department charged with the administration of the project thought they should and would be paid for.

3. The water rights are not being seized from all owners of grasslands along the San Joaquin. The Federal Government has already paid more than $5,000,000 to the landowners of the San Joaquin Valley for exactly similar water rights.[9] Because of doubts as to the application of California law to their particular case, a number of the small landowners, such as three of the respondents here, have been forced not only to bear the costs of suit but also to deal with novel assertions of federal power which, quite rightly, did not trouble the officials charged with the administration of the program.

4. The United States has already bought the very water rights in question in three of these cases, but unfortu-

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[8] In *United States* v. *Central Stockholders' Corporation*, 52 F. (2d) 322 (C. C. A. 9) the Government urged, on behalf of its Federal Power Act licensee, a right to take the overflow waters of the San Joaquin without compensation because of its navigation powers and as an upstream riparian owner. The court, holding the licensee liable to pay just compensatino under the Act, decided neither contention. It was obviously surprised at the Government's position (52 F. (2d) at 324, 329) and the failure of the Government to file a petition for writ of certiorari, as to issues so far-reaching as these, has more than usual significance. In *Southern California Edison Co.* v. *Herminghaus*, 275 U. S. 486, No. 188, Oct. Term 1927, a licensee of the Federal Power Commission urged that it possessed the alleged privilege of the United States to destroy riparian rights in the San Joaquin (Br. 91-97); its petition was dismissed after argument for want of a substantial federal question.

[9] In only one branch of the argument, that dealing with issues of state law, is the difference between the two types of grassland water rights—controlled and natural flow—of any significance.

nately, under the decision below, has contracted to pay the wrong person.

5. This is not only the first time the Government has urged to this Court that its sovereign powers over navigable waters reach to the western irrigator's water right, but the contention is presented, in three of the six cases before the Court, in circumstances where the beneficiary of that argument, should the Solicitor General prevail, is not the public treasury but Miller & Lux, Inc. Under the 1939 contract, if the Solicitor General should somehow persuade this Court that the United States has unnecessarily paid Miller & Lux $1,938,650, the result will be not the recovery of that sizeable amount but instead the payment of a further $511,350 to Miller & Lux.

In the following pages we present our statutory argument in detail. We shall then present in more summary form our thoughts on the constitutional issues so ably briefed by the Solicitor General. Thereafter we shall deal with the minor issues of California law and the date of the taking.

II

CONGRESS HAS DETERMINED THAT IRRIGATION WATER RIGHTS, VALID UNDER STATE LAW, MUST BE PAID FOR WHEN TAKEN BY A RECLAMATION PROJECT

In the succeeding part of this brief we show that there has been a consistent and undeviating recognition by the Congress, whenever the issue has been presented to it, that the western water right is a property interest to be as firmly protected as the eastern uplands (*infra*, pp. 38-42). It is, however, unnecessary to travel so broad a path and this section deals only with the reclamation laws under which the respondent's water rights were taken. These laws make unmistakably plain the intention of the Congress that all irrigation water rights, valid under state law, should be paid for when taken in aid of a reclama-

tion project. That being so, there is of course no constitutional issue, for the implied contract on which the jurisdiction of the Court of Claims rests may be founded on a statutory as well as a constitutional promise and duty.

A. The Reclamation Laws Generally

1. This Is a Reclamation Project. The Central Valley Project, after a few months existence as a Federal Emergency Relief Act project,[10] was formally authorized under the adminstrative procedure provided by the reclamation laws.[11] A finding of feasibility was made by the Secretary of the Interior on November 26, 1935, and his recommendation "of the Central Valley development as a Federal reclamation project" was approved by the President on December 2, 1935 (R. 91-93; Rsp. Br., App. i - x).

The project was twice again authorized as a reclamation project by specific act of Congress. In order to transfer $12,000,000 earlier appropriated to the Corps of Engineers, and to exclude this amount from the reimbursement provisions of the reclamation laws,[12] Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850) "reauthorized" the "entire Central Valley project"; it declared that, except as otherwise provided

[10] Under Section 4 of the Federal Emergency Relief Appropriation Act of 1935 (49 Stat. 115), the President had general authority "to prescribe the duties and functions of necessary agencies"; and under Section 1, reclamation projects were to be carried out by the Bureau of Reclamation and Department of the Interior. The President on September 10, 1935 made an allotment of $20,000,000 for the project; it prescribed that the funds should be used for the construction of Friant Dam and canals, and that they "shall be reimbursable in accordance with the reclamation laws." Montgomery and Clawson, *supra*, App. C., p. 247.

[11] Section 4 of the Act of June 25, 1910 (36 Stat. 835, 836, 43 U. S. C. Sec. 413) and Section 4-B of the Act of December 5, 1924 (43 Stat. 672, 702, 43 U. S. C. Sec. 371) authorize projects under the Reclamation Act of June 17, 1902, upon a written finding of feasibility by the Secretary of Interior approved by the President. The authorization under the reclamation laws followed the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174.

[12] See H. Rpt. No. 885, 75th Cong., 1st Sess., p. 40; S. Rept. No. 916, 75th Cong., 1st Sess., p. 46.

(i. e., the non-reimbursable $12,000,000), "the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation and maintenance of the dams, canals; * * * and incidental works deemed necessary to said entire project." This reauthorization under the reclamation laws was repeated in the Rivers and Harbors Act of October 17, 1940 (54 Stat. 1198, 1199-1200), which amended the proviso containing it to include also authority for "the construction under the provisions of the Federal reclamation laws of such distribution systems" as were necessary to deliver the stored water.[13]

2. Water Rights Taken by a Reclamation Project Must Be Paid For. The Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U. S. C. 391 et seq.) applies only to the 17 western states,[14] the lands of which are predominantly arid and the water law of which is predominantly appropriative. The Reclamation Act has been on the books for almost 47 years, and close to a billion and a half dollars has been spent in its execution. We know of no suggestion, until this litigation, that irrigation water rights recognized by state law might be taken by a reclamation project without compensation to the owner simply because the stream chanced to be navigable.

Section 8 of the Reclamation Act (43 U. S. C. sec. 383) provides:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in

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[13] See H. Rpt. No. 2361, 76th Cong., 3d Sess., p. 13; S. Rept. No. 1876, 76th Cong., 3d Sess., p. 4; S. Rept. No. 2072, 76th Cong., 3d Sess., p. 9.

[14] Section 1 of 1902 Act; Texas was added by the Act of June 12, 1906, 34 Stat. 259.

> conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof:

This language is unmistakably clear: nothing in the Reclamation Act is "to affect or to in any way interfere with" state water laws relating to irrigation, "or any vested right acquired thereunder:" and the projects were to be executed "in conformity with such laws." Nor can there be any thought that navigable waters are, by some vague distillation from the ordinary federal powers, to be put beyond this subordination. The language is all-embracing, and contains no saving of navigable waters such, for example, as that found in the Desert Land Act of 1877 (see *infra*, p. 39). It contains, indeed, explicit inference to the contrary, for the statute goes on to repeat that nothing in the Act "shall in any way affect any right" not only of the federal or state governments, but also of "any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."[13]

The legislative history of Section 8 contains just one statement which supports the Government. The House Committee reporting the bill said (H. Rpt. No. 1468, 57th Cong., 1st Sess., p. 6) that "Section 8 recognizes state control over waters of nonnavigable streams such as are used in irrigation." The Committee, as this sentence shows, was not considering the possibility of putting a navigable stream to irrigation uses and the statute itself is not confined to "nonnavigable streams." The Senate

[13] Not all interstate streams are navigable, but it is unlikely that Congress could legislate with respect to interstate streams without considering the problem of navigable streams. This clause was inserted to ensure that the Congress did not inadvertently influence the outcome of *Kansas v. Colorado*, 206 U. S. 46, a three-cornered dispute then pending between the United States as owner of the public lands, an appropriation state and a common law state, and carries no other affirmative significance. See *Wyoming v. Colorado*, 259 U. S. 419, 463.

Committee did not repeat the error of the House Committee. See S. Rept. No. 254, 57th Cong., 1st Sess. Nothing else in the legislative history suggests in any way a purpose to except navigable waters from the basic protection granted the water user by Section 8. There is, to the contrary, much evidence that Section 8 was intended to cover the use of all waters on the arid lands of the west.

The Reclamation Act was enacted in fulfillment of the pledge in the 1900 Republican Platform to enact "adequate national legislation to irrigate the lands of the United States, reserving control of the distribution of water to the respective States and Territories." 35 Cong. Rec. 6672, 6676. President Roosevelt in December 1901 strongly recommended enactment of such a measure, but was emphatic that the legislation should offer affirmative protection to state laws and "vested rights." 35 Cong. Rec. 6676, 6775-6776. The bill, drafted by a bipartisan committee of western Senators and Representatives, and cleared with the President (35 Cong. Rec. 6673), passed the Senate on voice vote (35 Cong. Rec. 2285) with very little relevant debate; Senator Clark of Wyoming, however, speaking specifically to the great navigable rivers of the west, commended the bill because "in the distribution of those waters it is right and proper that the various States and Territories should control." 35 Cong. Rec. 2222. Mr. Mondell of Wyoming was in charge of the bill in the House. He stated, with a supporting enumeration of past legislation, that "every act since that of April 26, 1866 has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation," and noted that Section 8 follows this "well established precedent in national legislation." 35 Cong. Rec. 6678, 6679. Mr. Mondell, in debate with Mr. Ray of New York, sustained the constitutional power of the United States to purchase or to condemn water rights necessary for its projects. 35 Cong. Rec. 6687-6688. It was recognized on both sides that the

section applied to navigable as well as to non-navigable streams. 35 Cong. Rec. 6696, 6738.

The protection granted the water user is made more emphatic by the fact that, even after the debates noted above, Section 8 was changed by Committee amendment on the floor of the House to include the specific prohibition against interference not only with state laws but also "any vested right acquired thereunder." 35 Cong. Rec. 6762.[16]

It seems to us to be perfectly evident, from the debates as a whole, that the draftsmen and the supporters of the Reclamation Act would have been shocked had anyone suggested that they were authorizing the United States, because of its powers over navigable waters, to destroy water rights necessary to the productivity of arid lands and the livelihood of western settlers. Mr. Sutherland of Utah, supporting the bill, pungently summarized the sentiment of Congress (35 Cong. Rec. 6770, 6769):

> This bill does not atempt to confer upon the Secretary of the Interior the power to deprive him [the water appropriator] of his vested rights. It would be absolutely void and worthless if it did.
>
> * * * *
>
> No lawyer would contend that under this bill the vested rights of an individual to water could be taken for the purpose of giving it to some other individual or individuals.

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[16] The changes made by the committee amendment in the prior text of Section 8 may be indicated as follows:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, [but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act] *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land-owner, appropriator or user of water in, to or from any interstate stream or the waters thereof:* * * *

This Court has often enough made plain that Section 8 of the Reclamation Act means just what it says.[17] It was cited in support of the fact that Congress "has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States." *Power Co.* v. *Cement Co.*, 295 U. S. 142, 164. The Secretary of the Interior, in acquiring water rights under the reclamation laws, must proceed "in the same manner as a private appropriator * * * under state law. His rights can rise no higher than those of Wyoming." *Nebraska* v. *Wyoming*, 295 U. S. 40, 43. Section 8 is "a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes." *Nebraska* v. *Wyoming*, 325 U. S. 589, 614. The United States, under Section 8, has the position "of an appropriator of water for storage under the laws of Wyoming," *Ibid.*, 629. See also, *Ickes* v. *Fox*, 300 U. S. 82; *United States* v. *Ramshorn Ditch Co.*, 254 Fed. 842, 845-846 (D. Neb.); *United States* v. *Humboldt Lovelock Irr. Light & P. Co.*, 97 F. 2d 38, 42 (C. C. A. 9), cert. den. 305 U. S. 630.

While none of these decisions chanced on their facts to be directed to the appropriation of navigable waters, that gap is closed by *Mason Co.* v. *Tax Commission*, 302 U. S. 186. The Court there, while noting the difficulties of navigation in the natural state of the upper Columbia (302 U. S. at 190-191), unmistakably held it to be navigable waters of the United States at the site of Grand Coulee Dam (302 U. S. at 198). The Court proceeded to note that Section 8 of the Reclamation Act preserved state control of water rights, stated that "the Act has been

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[17] Section 8 has been noted, in cases not arising under the reclamation laws, as further support for the proposition that the federal control of public lands does not reach to the control of the waters. *Gutierres* v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 554; *Kansas* v. *Colorado*, 206 U. S. 46, 92-93; *Wyoming* v. *Colorado*, 259 U. S. 419, 463. The two earlier cases noted an exception with respect to navigable streams, but this was in connection with issues wholly different from Section 8 of the Reclamation Act.

administered in harmony with this controlling principle that the State should not be ousted of jurisdiction" (302 U. S. at 199), and detailed at length the precise steps the United States had taken, under state law, in order to gain authority to appropriate, store and divert the project waters (302 U. S. at 199-203).

3. Respondents' Water Rights Were Vested Under State Law. The Solicitor General in at least one passage (Br. 68, see Br. 47) seeks to escape the force of Section 8 on the ground that it is inapplicable because there can be no valid water rights under state law in navigable streams. We believe his logic to be impeccable, but also that it proceeds backward from his conclusion to a thoroughly startling premise. His position in this respect goes far beyond that which gives the western states, *amici curiae* here, so much concern, and denies the validity even among private citizens of water rights to navigable rivers. If accepted, it would seem likely to reduce to chaos the economies which have been built on the Missouri, the Colorado, the Columbia, the San Joaquin, the Sacramento, the Rio Grande, and the other great rivers of the west.

The Solicitor General's error consists in assuming that two carefully limited propositions have universal application. (a) Putting aside the statutory waivers discussed below (pp. 38-42), the United States has, if it chooses to exert it, unquestioned power to prevent future appropriations of water which would destroy the navigability of a western stream. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.[18] But this power is one which overrides state law, and does not deprive the state of jurisdiction to establish as among its citizens rights in navigable waters, whether these rights are injurious or non-injurious to navigability. See *Arizona* v. *California*, 283 U. S. 423, 460-464; *Arizona* v. *California*, 298 U. S. 558, 569. See, also,

[18] See 21 Op. A. G. 518, 522, for a description of the purpose to acquire by this dam private control over the entire valley of the Rio Grande.

the *Rio Grande* case itself, at 709, as to the validity even as against the United States of non-injurious appropriations. (b) Because of a fear that otherwise the states could not, by adoption of an appropriation system, impair the supposed riparian rights of the public lands of the United States,[19] Congress passed the Act of July 26, 1866 and the Desert Land Act of 1877. These are noted below (p. 39); it is sufficient here that their purpose was to eliminate any inviolable riparian rights that might attach to the proprietary holdings of the Federal Government. See *Power Co.* v. *Cement Co.*, 295 U. S. 142, 154-158. Those acts; even if they should both be limited to nonnavigable waters, can in no way curtail the water rights before this Court: (i) The rights in question are those of private owners, and the United States asserts no claim here which is based upon any riparian ownership. (ii) The rights in question are riparian, not appropriative, and from any view no Congressional legislation was necessary to preserve those rights. (iii) The western states were admitted on equality with the eastern states, and whether or not their lands were once a part of the public domain, they have full power (subject only to the commerce powers of Congress) to fix the nature and extent of private rights to navigable streams and their beds. See, e.g., *Pollard* v. *Hagen*, 3 How. 212, 229-230; *Shively* v. *Bowlby*, 152 U. S. 1, 15, 26.

It has generally been assumed, as of course, that the western water right attached to navigable as well as nonnavigable streams. See e.g., Weil, Water Rights in the Western States (3d Ed., 1911), vol. I, sec. 339; Bannister, Federal Disposition of State Waters, 28 Harv. L. R. 270, 293.

4. **The Administrative Practice.** The Solicitor General relies upon one ambiguous paragraph in a 1905 decision

[19] It may be doubted that any lands acquired under the Treaty of Guadaloupe-Hidalgo carried riparian rights and is fairly clear that those from the province of Sonora did not. See *Boquillas Land & C. Co.* v. *Curtis*, 213 U. S. 339, 343.

of the Secretary of the Interior to establish what he implies to be a uniform practice under the reclamation laws to disregard water rights based on navigable waters. In *California Development Co.*, 33 L. D. 391, the Secretary refused to approve a plan for acquisition by the Bureau of Reclamation of the Company's canal and distribution works by which Colorado River water was brought, through Mexico, to the Imperial Valley. The ground of his decision was that there was no authority to acquire Mexican property or stock (33 L. D. at 405-408). In the course of his opinion he used the language quoted in the Government's brief (pp. 69-70). The decision did not involve the compensability of water rights taken for a reclamation project. It did not mention or cite Section 8 of the Reclamation Act. The Government's own quotation shows that the claimed water right was far in excess of the rights vested through use, and that it would in itself destroy the navigability of the river. It was, therefore, a simple application of the *Rio Grande* rule.[20] Most certainly it is not a contemporaneous interpretation of a statutory provision which was inapplicable and was not even mentioned.

The Government's statement that the question has not since arisen "in any administrative or judicial proceeding" is so far as we know accurate. But, it seems evident, this is because the Bureau of Reclamation has invariably recognized such rights and there has been no occasion for the issue to be raised in a contested proceeding.

It should, in any event, be noted that the Department of the Interior in collateral fields has frequently recognized the validity of water rights in navigable streams. In

[20] It is not without significance that, with reference to this very controversy, Congress directed the Secretary of Interior to investigate "as to what legislation, if any, is necessary to grant or confirm to present and future appropriators and users thereof perpetual rights to the use of said waters for irrigation." Joint Resolution of Apr. 28, 1904, 33 Stat. 591.

Theodore A. Iasigi, 39 L. D. 285, decided just five years after *California Development Co.*, it recognized for a desert land entry the validity of water rights which were in actual use, and therefore vested, and which were based upon the California Development Company diversion from the Colorado. See, also, 32 Op. A.G. 41. And in *Underground Water Claims, Utah*, 55 L. D. 378, 379 (1935), the Department noted that, apart from interference with the navigation powers of the Federal Government, state laws govern the appropriation and use of navigable as well as nonnavigable waters.[21]

We see no way of reconciling the implications of the statement as to administrative practice found in the Government's brief with the unqualified statement of the Department of the Interior in 1945, made with specific reference to the Central Valley Project and therefore embracing navigable waters, that "throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure" (*infra*, p. 33).[22]

We believe, in the circumstances, that the Court should read literally the Government's presentation of the administrative construction (Br. 70) and conclude that, except as above noted, there has been no administrative or judicial proceedings relating to the issue, and that the Government

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[21] The Department decisions recognizing state control of water rights and water users rights to them do not draw any distinction between navigable and nonnavigable waters. See *Jackson Hole Irrigation Co.*, 48 L. D. 278, 279; *Myers and Myers*, 49 L. D. 106, 109; *Authority to Cause Diversion of Waters*, 57 L. D. 400.

[22] See, also, the comment by Prof. Toelle, of the University of Montana law school, made with specific reference to the problems of the great navigable rivers of the west, that "for 43 years the Bureau of Reclamation has so scrupulously observed that policy [of Section 8] that it has come to be regarded as the champion of the arid west." Prospective Effect of Valley Authorities in Western Water Law, 20 Temp. L. Q. 425, 431.

makes no statement as to the actual administrative practice.

There seems, in truth, to be no instance in the long history of the reclamation laws in which the Bureau of Reclamation has ever undertaken to seize water rights, in navigable or nonnavigable streams, without paying full compensation for them. The Commissioner of Reclamation testified to the House Appropriation Commitee in 1936 that the United States under the reclamation laws filed under state laws exactly as does a private person and, further, that the Bureau has to condemn if it takes the water right of another.[23] To take a recent illustration the Department of the Interior assumes as of course that its development of the water resources of the Colorado River basin must await state decision as to the use of the water; it speaks of the existing "vested rights" in irrigation water; and it recognizes, ordinarily tacitly and as of course, its duty of providing compensating storage for appropriated water rights, or else an exchange of water rights. The Colorado River (U. S. Dept. of Interior, Washington, 1946) pp. 3, 13, 109, 164-166, 180, 185. It is unnecessary to pursue the administrative construction throughout the history of its many projects, for the legislative and administrative construction is clear beyond any dispute with respect to the Central Valley Project itself, which is the only major example of a Reclamation project which involves an outright taking, as opposed to a replacement, of a substantial volume of water rights vested under state law.

B. The Central Valley Project

The full development of the Central Valley, it has always been recognized, requires that the grassland water rights along the San Joaquin be sacrificed in order to per-

[23] Hearings before House Appropriation Committee, Interior Dept., Fiscal Year 1937, 74th Cong., 2d Sess., p. 180.

mit a higher development of irrigable crop lands along the Madera and Friant-Kern canals. It has never occurred to anyone, until this litigation, that the rights to this water might be seized, for the purpose of resale, without compensation. To the contrary, every authorization of the project and every action in execution of the project has ensured that payment be made.[24]

1. **The Authorizations.** The administrative authorization, under the reclamation laws, of the Central Valley Project in 1935 is unmistakably plain. It estimates that $8,000,000 of the total costs will be required for "rights of way, water rights, and general expense," and particularizes this estimate by the explanation (R. 93)

> Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land * * *.

When the project was reauthorized by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 844, 850), the Congress expressly provided:

> * * * the Secretary of the Interior * * * may acquire by proceedings in eminent domain or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes * * *.

It is hard to see how this language may be tortured into a conclusion that water rights were to be treated any differently than lands, rights-of-way, and other property, or how it can be argued that the power to "acquire by proceedings in eminent domain or otherwise" could include the power to seize and then to deny liability for the taking.[25]

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[24] When the State of California proposed itself to develop the project, Section 11 of the Act of 1923 (Cal. Stats. 1933, pp. 2643, 2651) provided that "in no other way than by purchase or otherwise as in this act provided shall water rights * * * be impaired or curtailed."

[25] It will be noted that the Central Valley Project, as authorized in 1935 and in its present form, involves only two rivers, the Sacramento and the San Joaquin, and involves the taking of water rights only from the San Joaquin. See the feasibility reports of 1935 (R. 91-93; Resp. Br., App., i - x) and 1947 (H. Doc. No. 146, 80th Cong., 1st Sess.). There is, therefore, no room for any argument that the authorizations contemplated the purchase of riparian rights to nonnavigable waters but not to those of the San Joaquin.

2. The Practice. The Bureau of Reclamation has acted consistently on the assumption that it was required to pay for the vested water rights which would be taken by the project. This practice has, moreover, for more than a decade regularly been disclosed to the Congress and regularly approved by the Congress.

The contentions of the Solicitor General lead also to the conclusion that the Government need not purchase or replace the San Joaquin water used on croplands. The Bureau of Reclamation, to the contrary, has undertaken a gigantic engineering scheme — the movement of the excess waters of the Sacremento 150 miles up the San Joaquin — for no other purpose than the replacement of the San Joaquin water used on croplands. In this way 1,000,000 acre-feet of water will be supplied each year to 285,000 acres of land (R. 93, 94). The total cost of this construction work, apart from power facilities, and excluding operation and maintenance, will be about $83,000,000.[26] This heavy expenditure, well in excess of $100,000,000, is wholly unnecessary if the Solicitor General's argument be sound. We pass, however, to the grassland water rights immediately in issue here, and show that the Government's obligation to pay for their taking has been recognized with equal clarity.

F. Y. 1937. The first appropriation request included $8,000,000 for "water rights and general expense." Supplemental Hearing, Subcommittee of House Committee on Appropriations, Interior Department,[27] p. 79. A considerable part of these funds seem to have been allowed. See Act of June 22, 1936, 49 Stat. 1597, 1622, and estimate for fiscal year 1938, discussed below.

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[26] Central Valley Federal Reclamation Project, *supra* n. 1, p. 12 (the total includes only the Delta Cross Channel and the Delta-Mendota Canal).

[27] All references in this subsection are to the Central Valley Project and the hearings, except as otherwise noted, are those before the above subcommittee; the date and the session of the Congress appear sufficiently from the fiscal year.

F. Y. 1938. The Bureau requested $15,000,000 for three purposes, one of which was "the purchase of the greater part of the water rights that must be acquired." Hearings, p. 281. Its breakdown showed that a total of $6,500,000 was estimated for the purchase of "water rights, rights of way, etc.", that $3,500,000 was available and that $1,500,000 was asked for 1938. Hearings, p. 282. The House Committee in its report referred to this breakdown. H. Rpt. No. 786, 75th Cong., 1st Sess., p. 15. The Congress appropriated $12,500,000 for the project generally. Act of August 9, 1937, 50 Stat. 597.

F. Y. 1939. The Bureau had available $4,300,000 of the $6,500,000 estimate for "water rights, rights of way, etc.", and requested $500,000 for the fiscal year 1939. Hearings, p. 349. The House Commitee referred to this breakdown. H. Rpt. No. 1855, 75th Cong., 3d Sess., p. 14. The Congress appropriated $9,000,000 for the project generally. Act of May 9, 1938, 52 Stat. 291, 324.

F. Y. 1940. The Bureau informed the Congress that "the Miller and Lux water rights contract has been brought to a point where a conclusion of negotiations seems imminent." Hearings, p. 421. An additional $265,000 was requested for water rights. Hearings, p. 422. The Committee referred to this breakdown. H. Rpt. No. 161, 76th Cong., 1st Sess., p. 16. The Congress appropriated $10,000,000 for the project generally. Act of May 10, 1939, 53 Stat. 685, 719.

F. Y. 1941. The Bureau informed the Committee that $4,190,000 had been spent for "water rights, rights of way, etc." out of the estimated total of $6,520,000. It requested no funds for 1941. Hearings, p. 495. The Commitee referred to the "statement of construction progress" which included the water rights item. H. Rpt. No. 1709, 76th Cong., 2nd Sess., p. 14.

F. Y. 1942. The Bureau advised the Congress that $5,616,000 was now estimated for the total program of "wa-

ter rights, investigations, etc." of which $4,258,000 would be spent by the end of F. Y. 1941; another $832,000 was requested for 1942. Hearings, p. 741. The Congress appropriated $34,750,000 for the project generally. Act of June 28, 1941, 55 Stat. 303, 336.

F. Y. 1943. The Bureau advised the Congress that its total program for "water rights, investigations, etc." was $5,606,000, and requested $183,000 for 1943. Hearings, pp. 434-439. The Congress appropriated $39,019,000 for the project generally. Act of July 2, 1942, 56 Stat. 506, 537.

F. Y. 1944. The Bureau requested $500,000 for "examination, surveys, water-rights, etc. not allocated to divisions." Hearings, p. 1174. The Congress appropriated $200,000 for "examinations, surveys and water rights." Act of July 12, 1943, 57 Stat. 451, 477.

F. Y. 1945. No reference was made to water rights.

F. Y. 1946. The Bureau advised the Congress, with reference to Madera Canal, that "water rights necessary to provide an adequate supply of water for the irrigation of project lands will be required." It stated that $293,400 would be spent in 1946 for "examination, surveys, water rights, etc.," but requested no additional appropriation. Hearings, p. 1200.

F. Y. 1947. The Bureau advised the Congress that its total program for water rights in the Friant Division was $867,100 for investigation and $4,500,000 for "purchase and acquirement." Of this $728,280 would be spent for investigation and $4,091,570 for "purchase and acquirement" by the end of F. Y. 1946. It requested $80,000 and $230,000 for the respective purposes in 1947. Hearings, Pt. 2, pp. 315-317. Congress appropriated $6,284,020 for irrigation facilities generally. Act of July 1, 1946, 60 Stat. 348, 367.

F. Y. 1948. The Bureau advised the Congress that its total program for the acquisition of San Joaquin water

rights was $5,367,000 and asked $257,300 for 1948. Hearings, Pt. 3, pp. 749-752. The Congress appropriated $5,622,028 for irrigation facilities generally. Act of July 25, 1947, 61 Stat. 475.

F. Y. 1949. The Bureau advised the Congress that a total of $5,750,000 would be required for the purchase of water rights for the Friant division and requested $332,000 for 1949. Hearings, p. 1214; Senate Hearings, p. 923. The Congress appropriated $30,876,900 for "irrigation facilities generally." Pub. No. 841, 80th Cong., 2d Sess. There was, moreover, in this year a rather full explanation of the water rights purchase program along the San Joaquin given (about a month after the argument of these cases in the court below) by the Regional Director of the Central Valley Project.[28]

1936 - 1949. This Court has rarely if ever been offered so extensive and complete an example of contemporaneous and consistent administrative practice, made known to and ratified by the Congress. Over the past 13 years, the Bureau of Reclamation has in each of 12 years advised the Appropriation Committee that it was purchasing San Joaquin water rights; it has in each of 11 years requested and received appropriations for this purpose; and for fiscal year 1944 the accidents of appropriation structure included a specific statutory itemization for the water rights as such.

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[28] His testimony (Hearings, pp. 1280-1281) was:

MR. JENSEN. * * * The next item is "Water rights, $332,000." Tell us about it.

MR. BOKE. * * * on the San Joaquin River where the general story is that through our operation, under our set-up, we are depriving or we are alleged to be depriving in some cases, water users in that area of their water. * * * Part of that $332,000 would be used to settle the remaining outstanding claims that we have along the San Joaquin River, in an area known as the Friant to Gravelly Ford area. There are about, I believe, 226 users in that area and we have settled with about 212 of them.

We have certain payments to make for those water users whose use of the water we have damaged, or are damaging through the operation of the Friant Reservoir and the diversion of the San Joaquin River water down the Friant-Kern canal and out through the Madera canal. Some of the money will be used in settling those cases.

In addition, we have some 37 suits against us, I believe as a total, in the San Joaquin Valley.

Moreover, the feasibility and allocation report of the Secretary of the Interior, submitted to the Congress under approval of the President dated February 19, 1947, makes plain this common understanding that the San Joaquin water rights must be purchased. This report, which is a basic document under Reclamation practice, estimates the total cost of "water rights and miscellaneous" at $8,457,500. Central Valley Reclamation Project, H. Doc. No. 146, 80th Cong., 1st Sess., p. 12. It explains that "more than three-fifths of this total represents the cost of acquiring certain water rights (particularly along the San Joaquin River), easements and settlements necessary for the construction and operation of the project." *Ibid.*, p. 14. It notes that of the total estimated cost, $5,367,100 is "for water rights purchased." *Ibid.*, pp. 25, 41.

The comprehensive plan for the ultimate development of the Central Valley Basin, distributed by the Department of Interior for comment in November 1945, makes this even plainer. It estimates that $1,100,000 will be necessary after June 30, 1945 to complete the purchase of rights on the San Joaquin. More explicitly, the description of the plan contains this categorical reassurance to the water user:[29]

> In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure.

It is unnecessary to proliferate citations to the cases in which this Court has accepted administrative construction of doubtful statutes. It is sufficient, if the controlling stat-

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[29] Comprehensive Plan for Water Resources Development, Central Valley Basin, California (U. S. Dept. of Int., Bur. of Reclam. Proj. Planning Rpt. No. 2-4.0-3, Nov. 1945), pp. 24, 21.

utes were in any way doubtful, that this administrative and legislative record, more than in any case in recent years, "not only confirms the departmental construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act." *Brooks* v. *Dewar*, 313 U. S. 354, 361. See, as to the reclamation laws, *Swigart* v. *Baker*, 229 U. S. 187, 197-199.

C. The Statutory Promise Is Ground for Suit

The Government's argument (Br. 60-65) on this score seems to veer between a substantive argument that Congress promised no compensation and a jurisdictional argument that the promise if made would not give the Court of Claims jurisdiction of these suits.

The contention that the Central Valley authorizations and appropriations were a mere authorization to the Secretary in his discretion to make payment for the seized water rights does not advance the Government's case: (a) the repeated appropriations by Congress, made on the assurance that the seized water rights would be paid for, are certainly sufficient as a Congressional direction, if more than an authorization should be necessary; (b) Section 8 of the Reclamation Act is a quite plain "direction"; and (c) if the Congress should merely have been leaving the matter to the Secretary's discretion, that discretion has been exercised in favor of payment — as to three cases before the Court he undertook to buy from the wrong person and as to the other three an agreement on price could not be reached (see Govt. Br. 61-62, n. 12).

The Congress has, even if the duty to pay for the taking here could be so charitably described, full power to create obligations based upon moral or honorary grounds. *Pope* v. *United States*, 323 U. S. 1, 9-10, and cases cited. Even though no express provision is made for suit, the statutory obligation so created carried with it Court of Claims juris-

diction of a suit based upon that "law of Congress." *United States v. Realty Co.*, 163 U. S. 427; *Medbury* v. *United States*, 173 U. S. 492, 497-498; *McLean* v. *United States*, 226 U. S. 374, 378; *United States* v. *Hvoslef*, 237 U. S. 1, 10-11; *United States* v. *Laughlin*, 249 U. S. 440, 442-443. So, too, the statutory provision for purchase and compensation will serve to create a promise implied in fact to pay for the property taken just as fully as the command of the Fifth Amendment with respect to other types of property interests. See *United States* v. *Alexander*, 148 U. S. 186, 188-192, and the reliance placed upon the statutory recognition of the taking in *United States* v. *Lynah*, 188 U. S. 445, 467. The reasoning of the *Lynah* case is as applicable to a statutory as to a constitutional obligation to pay. See, also, *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330, 333; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21. It may also be noted that Judge Cardozo, in *Oswego & Syracuse R. R. Co.* v. *State*, 226 N. Y. 351, 124 N. E. 8 (cited with approval in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377) sustained the New York Court of Claims jurisdiction in a statutory setting analogous to that found here.

The Solicitor General places much reliance on *Mitchell* v. *United States*, 267 U. S. 341 (Br. 62-63). But that case, as his own quotation shows, recognized that suit in the Court of Claims would be allowed if the plaintiff could show a statutory right of payment; the Court held only that the general provision authorizing payment for "damages and losses * * * resulting from the procurement of the land" did not show a sufficient intention to widen the ordinary and long-accepted limits of recovery for an eminent domain taking. *Great Western Serum Co.* v. *United States*, 254 U. S. 240, appears to be the same sort of case. Neither has any application to a statutory policy in force since 1902, specifically applied to this project, and repeatedly ratified by the Congress in its annual appropriations.

III

VALID IRRIGATION RIGHTS ON THE SAN JOAQUIN COULD NOT BE SEIZED WITHOUT COMPENSATION EVEN BY WORK OUTSIDE THE RECLAMATION LAWS

We see no way by which, in the face of the legislation discussed above, this Court can reach the interesting and novel constitutional issues discussed by the Government. They have, however, a relevance to this case at least by way of explanation of the action of Congress in prescribing that the San Joaquin irrigation waters should be paid for when taken by the Government. We shall, therefore, sketch the constitutional issues as we see them.

A. The Navigation Immunity Does Not Reach to the Seizure of Irrigation Water

1. The Navigation Immunity. This Court has never considered the consequences of navigation or commerce work which takes water rights in a case arising from any of the 17 western states.[30] If it should ever be forced to face the problem presented by a denial of liability for a taking of vested irrigation rights, we believe that it will probably reach a different result than that of the eastern cases.

The United States has, of course, a plenary power to control and improve navigation, and to protect interstate commerce, in western as in eastern streams.[31] But a plenary power of control does not of itself give the privilege of seizing private property without compensa-

[30] The Court in *United States* v. *Willow River Co.*, 324 U. S. 499, 504-505, noted the contrasting systems of water rights as between the eastern and western states but did not spell out the consequences of the differences; no other just compensation decision has even noted the difference between the water rights systems.

[31] *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690, 703-709; *United States* v. *Utah*, 283 U. S. 64, 90; *Arizona* v. *California*, 283 U. S. 423, 452; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523, 534-535.

tion. *United States* v. *Causby*, 328 U. S. 256. Indeed, the ordinary requirement of just compensation applies to navigation work itself.[32] The costless "taking" often prescribed by the navigation cases is not an inexplicable exception to the Fifth Amendment, but is instead a reflection of the conclusion that the "owner" had no property right which was taken.

This is made plain enough by the cases denying compensation. "That the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69. "There is no private property in the flow of the stream." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. The owner, "as against the demands of commerce, has no private rights of access to the waters." *United States* v. *Commodore Park*, 324 U. S. 386, 390-391. The lands below high water mark are held "subject to the servitude in respect of navigation," *Gibson* v. *United States*, 166 U. S. 269, 272; *Willink* v. *United States*, 240 U. S. 572, 580; the owner has "a bare technical title * * * held at all times subordinate" to the needs of navigation, *Scranton* v. *Wheeler*, 179 U. S. 141, 163. One cannot have as against navigation needs a compensable "private property right" to submerged lands, *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88; "as against the Government such private interest is not a right at all." *United States* v. *Willow River Co.*, 324 U. S. 499, 510.

If, then, there can be no property right as against the Federal Government in the waters of western navi-

[32] The United States must pay just compensation for the permanent flooding of uplands, *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Dickinson*, 331 U. S. 745; *Hood* v. *United States*, 46 Ct. Cls. 30; for the property interests taken by intermittent flooding or erosion, *Jacobs* v. *United States*, 290 U. S. 13, 16; *United States* v. *Dickinson*, supra; for flooding out the right of access to public highways, *United States* v. *Welch*, *supra*; *United States* v. *Grizzard*, *supra*; and, possibly still, for eliminating the drainage from uplands, *United States* v. *Lynah*, 188 U. S. 445.

gable streams, these cases apply with full force. If, on the other hand, there is such a property right, then they are inapplicable and irrigation rights may not be seized without the payment of just compensation.

2. The Western Water Right. As a general rule, the property interests for which the United States must pay just compensation are those recognized by state law. *United States* v. *Powelson*, 319 U. S. 266, 279; *United States* v. *Causby*, 328 U. S. 256, 266; Federal Eminent Domain, secs. 15B, 15F. This rule has on occasion been applied to riparian or other rights with respect to navigable waters. See, e. g., *United States* v. *River Rouge Co.*, 269 U. S. 411, 418; *cf. United States* v. *Central Stockholders' Corp.*, 52 F. 2d 322 (C. C. A. 9). It is shown below (pp. 49-56) that the riparian rights here in issue are vested rights of property under state law. It is true, however, that the customary servitude of navigable waters to the commerce powers of Congress is taken to be one fixed by the Constitution. In that view one must go farther than state law, and show that the property interest has been recognized and confirmed by Congress. For, just as Congress may waive a constitutional immunity from state taxation,[33] so it assuredly has power to recognize as property rights riparian interests which otherwise might be taken by the United States without compensation.[34] See *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377.

It is entirely clear that, in addition to the reclamation laws already discussed, Congress has repeatedly and emphatically recognized and protected the water rights of

[33] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525-526; *Helvering* v. *Gerhardt*, 304 U. S. 405, 417; *United States* v. *Bekins*, 304 U. S. 27, 52.

[34] Compare *United States* v. *Causby*, 328 U. S. 256, 263-264, where the Court accepted the 500 foot level, prescribed by the Civil Aeronautics Authority under statutory authority, as the measure of the air space which the landowner was entitled to have free of aircraft.

the arid lands. The Act of July 26, 1866 (14 Stat. 251, R. S. Sec. 2339, 43 U. S. C. sec. 661) is the basic enactment. It covers the entire field open to Congressional action,[35] and declares broadly:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same;"

From 1866 to the present day the Congress has repeatedly and consistently acted upon this principle. The Desert Land Act of 1877 (19 Stat. 377) held open to public appropriation all unappropriated waters "upon the public domain and not navigable." See *Power Co.* v. *Cement Co.*, 295 U. S. 142, 157. The Act of March 3, 1891 (26 Stat. 1095) granted ditch rights-of-way, but was careful to provide that nothing should "interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Similar precautionary provisions, in addition to the fundamental recognition given state laws by section 8 of the Reclamation Act, are frequent in the federal reclamation and related laws.[36] Indeed, the Congress, in authorizing irri-

[35] The statute has not, it is true, been construed in all respects as broadly as its terms would permit. Thus, in *United States* v. *Rio Grande Dam Co.*, 174 U. S. 690, the Court held it overridden by the Act of September 19, 1890 (26 Stat. 454) forbidding obstructions to the navigable capacity of waters (174 U. S. 707-710), intimated strongly that it did not in any event authorize diversions which interfered with navigability (174 U. S. 706-707), and suggested that it was directed only at nonnavigable waters (174 U. S. 706). See, also, *Power Co.* v. *Cement Co.*, 295 U. S. 142, 155. So, too, it has ordinarily been read as directed to water rights on the lands constituting the public domain in 1866. See, e. g., *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670; *Broder* v. *Natoma Water Co.*, 101 U. S. 274.

[36] Section 2 of the Warren Act of February 21, 1911 (36 Stat. 925, 43 U. S. C. sec. 524); Section 11 of the Raker Act of Dec. 19, 1913 (38 Stat. 242, 250); Section 18 of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. sec. 617a); Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940 (54 Stat. 774); Sec. 3 (b) of the Water Conservation and Utilization Act of October 14, 1940 (54 Stat. 1119).

gation or water control projects which might in any way conflict with state water law, customarily makes either the efficacy of the legislation or the initiation of the project depend upon the consent of the state or states concerned.[37]

Even on a major interstate stream, constituting navigable waters of the United States, the Congress was careful to preserve state authority over water rights.[38] So, too, Congress has approved interstate compacts which in terms preserve state control of the appropriation, use and distribution of waters taken from navigable rivers.[39] The most recent compacts relating to interstate waters carry this precautionary assurance to the water users one step further, and categorically guarantee him protection against any loss of his rights by federal action.[40]

The same solicitude by Congress is reflected in Sec. 27 of the Federal Water Power Act of 1920 (41 Stat. 1063, 16 U. S. C. sec. 821), a statute largely confined to navi-

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[37] See Sec. 7 of the Red Bluff Project Act of June 18, 1926 (44 Stat. 753); Sec. 4 (a) of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. sec. 617c); Sec. 1 (c) of the Columbia Basin Anti-Speculation Act of May 27, 1937 (50 Stat. 208); Sec. 7 of the Columbia Basin Project Act of March 10, 1943 (57 Stat. 14). Thus, in modifying water user obligations in the Uncompahgre Project, Congress made its legislation conditioned upon state legislation and a state court decree permitting *inter alia*, the necessary adjustment of water rights. Act of January 31, 1931 (46 Stat. 1974).

[38] See Sec. 8 (b), 12 (b), 12 (c) of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057, 43 U. S. C. Sec. 617 g, 1).

[39] See Art. IV of Colorado River Compact, approved by Sec. 13 of the Boulder Canyon Project Act of December 21, 1928 (50 Stat. 1057, 43 U. S. C. sec. 6171); Art. VIII of the Rio Grande Compact, approved by the Act of June 17, 1930 (46 Stat. 767); Art. XII of the Rio Grande Compact, approved by the Act of May 31, 1939 (53 Stat. 785).

[40] The Congress in approving both the Republican River and the Belle Fourche River Compacts has enacted, as requested in the compacts that:

> "The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters * * *.

Sec. 2 (a) (3) of the Act of May 26, 1943 (57 Stat. 86) and of the Act of February 26, 1944 (58 Stat. 94).

gable waters of the United States, that nothing therein "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation or distribution of water used in irrigation or for municipal or other purposes, or any vested right acquired therein." See *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 378-379.

The federal policy is, finally and most clearly, indicated in the Flood Control Act of December 22, 1944 (58 Stat. 887), Section 1(b) of which provides:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

This policy has become a standard provision in all subsequent rivers and harbors and flood control acts.[41] The 1944 Act covered some nine projects in the San Joaquin basin. (58 Stat. at 901-902). It would be extraordinary, indeed, if a decision of this Court should read the reclamation laws to subordinate vested water rights to a highly fictitious navigation interest while the real navigation and flood control work in the same valley is subordinated to irrigation rights.

This array of statutes is relevant both in their literal application and as indicative of the Congressional policy. In their literal application, they indisputably protect the western irrigator in many instances where there might

[41] Rivers and Harbors Act of 1945, 59 Stat. 10, 11; Rivers and Harbors Act of 1946, 60 Stat. 634; Flood Control Act of 1946, 60 Stat. 641; Rivers and Harbors Act of 1948, Sec. 101, Pub. No. 858, 80th Cong., 2d Sess.; Flood Control Act of 1948, Sec. 202, Pub. No. 858, 80th Cong., 2d Sess.

well be no protection in the eastern states: examples are all navigation and flood control work authorized in 1944 or later, or on the streams covered by compacts, and activities under the Federal Water Power Act. Until the present litigation, it had generally been supposed that the protection against reclamation work given by Section 8 was similarly indisputable. The Act of July 26, 1866, would seem on its face to cover all waters, navigable or not, flowing over the public domain.[42] If so, we know of no type of federal work on navigable rivers which is not forced by Act of Congress to recognize vested rights to irrigation water.

There would be gaps in this protection if, for example, the Act of 1866 were actually held inapplicable to navigable waters, and if the Solicitor General's construction of the Reclamation Act were accepted. But it is very hard to escape the conclusion that Congress, although acting in a piecemeal fashion, has on every occasion when the issue was presented taken pains to protect the rights of the irrigator. This does not mean that one may destroy navigation in order to obtain water rights for new irrigation. *United States* v. *Rio Grande Irrigation Co.*, 173 U. S. 690. But it does mean that the Congress has, whenever the issue arose, taken steps to ensure that present irrigation uses should not be destroyed, without compensation, in the name of navigation or flood control. Since it has, accordingly, elevated the western water right into a property right even as against the Government when jeopardized by any of a dozen or so types of projects, it seems that this Court should pause before holding, even if this were a type of project which had not specifically been covered, that the irrigator had no more of a property right than the eastern power company.

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[42] As indicated in note 35 above, the Court in the *Rio Grande* and *Cement Co.* cases assumed or suggested that the "nonnavigable" qualification of the Desert Land Act was to be read into the Act of 1866. This has never been squarely decided, and it is hard to believe that Congress in 1866, as today, did not wish to protect the very extensive development based on the waters of the navigable rivers.

B. Irrigation Work Cannot Benefit from Any Navigation Immunity

We shall sketch here the outlines of an alternative position, that whatever the Congressional recognition of respondents' rights to the San Joaquin water, they cannot be seized without compensation because the taking was for the purpose of resale as irrigation water, rather than for the improvement of navigation or the protection of commerce.

1. **Navigation.** There is no doubt that the improvement of navigation is one of the cardinal objectives of the Central Valley Project as a whole, and that this has authoritatively been declared by the Congress. Act of August 26, 1937 (50 Stat. 844, 850) as amended by Act of October 17, 1940 (54 Stat. 1198, 1200).

There is, on the other hand, no doubt that Friant Dam itself will in no way aid navigation. It will, indeed, substantially dry up the San Joaquin above Mendota and will diminish its navigability at all points above Stockton (R. 103).[43] The navigation benefits flow entirely from Shasta Dam and are confined solely to the Sacramento River.[44] The water of the Sacramento is an engineering condition precedent to the irrigation work on the San Joaquin and the Shasta power revenues are necessary to support the San Joaquin project, but the San Joaquin work

[43] It should be noted that under the earlier plan the Sacramento water would be pumped up the San Joaquin, rather than through the Delta-Mendota Canal, and that locks were contemplated to give a 6-foot depth to Mendota. See President's Report on Central Valley Project of June 4, 1934, H. Doc. 395, 73d Cong., 2d Sess.; letter of Secretary of the In- That plan has been abandoned (R. 94). The State of California had reference to this plan when it enacted in 1933 that Friant Dam was to be in aid of navigation. Stats. of 1933, p. 2643. This provision was carried forward in 1943 merely as a part of a general reenactment of the water code. Cal. Stats. 1943, pp. 1604, 1747.

[44] See, for the most detailed discussion, Central Valley Project Studies, Allocation of Costs (U. S. Dept. of Interior, Bureau of Reclamation, 1947), pp. 78-83, 121-124.

is neither necessary nor useful to the navigation improvement of the Sacramento.[45] The Solicitor General, then gains no benefit from the rule that the United States has authority to destroy navigation in one part of a river in order to improve navigation in another.

The combination of Friant into a comprehensive plan is not enough to put it in the status of a navigation project. The nonnavigation diversion of the San Joaquin is tied by the overall plan into another project with navigation ends, but only in the sense that separate projects are coordinated and jointly planned to obtain the maximum benefit from each. And respondents seek redress not against the entire Central Valley project, not against any comprehensive plan, but only against a specific diversion of the San Joaquin. See *South Carolina* v. *Georgia*, 93 U. S. 4.

It is true, if the issue be the power of Congress to undertake the work or to exercise its regulatory powers, the courts will examine the comprehensive plan of which the particular project is a part. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527-528; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426-427. We do not doubt that, if a navigation purpose were necessary to authorize the project, the San Joaquin Valley work would be a justifiable corollary to gain the greatest general benefit from the work on the Sacramento. But the issue is one of compensability, not of authority. For this one must look to the work which accomplished the taking, not to the grand scheme of the water basin planners. The Bureau of Reclamation, for example, is authorized to construct transmission lines away from Shasta because, *inter alia*, it is an incident of the federal power to improve navigation; but this does not mean that it need not pay for the land taken to erect the lines.

[45] Feasibility Report, Central Valley Project, H. Doc. No. 146, 80th Cong., 1st Sess., pp. 21-22.

The Department of the Interior is now planning its reclamation and related work in terms of the great river basins of the West.[46] Each plan includes scores of projects covering tens of thousands of square miles. Sometimes the work is grouped together under the head of a single "Central Valley Project," "Columbia Basin Project," or "Missouri Basin Project." See, e. g., Appropriation Act of July 25, 1947, 61 Stat. 460, 475-476. The Government's contention would spread the navigation immunity over every project on every tributary creek simply because the basin plans were integrated in a consistent whole.

United States v. *Commodore Park*, 324 U. S. 386, will support no such result. It is one thing to view a single dredging operation involving both a bay and a nearby creek as a single project and quite another to say that pleasure boat navigation on the lake formed by Parker Dam on the lower Colorado can, through the magic of integrated planning, make into a navigation project the Kendall irrigation project in Wyoming, 1200 miles north and two miles up. *Commodore Park*, it may further be noted, is inapplicable here in quality as well as in degree, for the damage on Mason Creek was in aid of the dredging in Willoughby Bay, while the San Joaquin Valley work in neither an engineering nor a financial sense is of any aid whatever to the navigation work on the Sacramento (*supra*, pp. 43-44).

This conclusion involves no effort to look behind the Congressional declaration of a navigation purpose *into* the true motives of Congress.[47] It involves instead the more modest request that the Congressional declaration be read as Congress itself understood the facts: one project

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[46] See, e.g., The Colorado River (U. S. Dept. of Interior, 1946); The Columbia River Basin (U. S. Dept. of Interior, 1946).

[47] *Cf. Arizona* v. *California*, 283 U. S. 423, 455-456; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 528; *United States* v. *Commodore Park*, 324 U. S. 386, 392.

in the comprehensive plan, Shasta Dam, was intended to aid navigation, while another, Friant Dam, was intended to produce only irrigation benefits.

2. Flood Control. Friant Dam, as an incident to its irrigation purpose, will produce substantial flood control benefits. But, as the issue here is the compensability of a taking, those flood control benefits are relevant only so far as they relate to interstate commerce. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423-424, 426-427; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525, 527-528. Any flood control benefits of Friant Dam to commerce are both incidental and wholly trivial.

The San Joaquin Valley has suffered an average annual flood damage estimated at $1,460,000.[48] But this is almost entirely damage to crop lands; only 7.6% or about $110,000 represents damage done to "roads, bridges, buildings, equipment and utilities."[49] Given the wide coverage of this category and the abnormalities of the period covered, it is generous to assume a $50,000 annual damage to roads and bridges. Friant Dam will decrease this damage only by about $7,500 a year.[50] The estimated cost of the San Joaquin Valley irrigation work is $157,000,000.[51] This is unparalleled and incredible extravagance if a motivating purpose of the project is to give flood protection to instrumentalities of interstate commerce. That protection, almost too obviously for argument, is both trivial and

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[48] Report of Chief of Engineers on San Joaquin River, H. Comm. on Flood Control, Comm. Doc. No. 2, 78th Cong., 2d Sess., pp. 29, 32.

[49] *Ibid.*, p. 31. This census, the only one made, relates to 1937-1938. It largely overrates the flood damage to roads and bridges. These are damaged only by rain floods (p. 30) and in 1937-1938 there were 3 rain and 1 snow-melt floods (p. 29) whereas in the whole period 1900-1940 there were only 15 rain and 23 snow-melt floods (p. 29).

[50] Friant will reduce the total annual damage of $1,460,000 by only $240,000. *Ibid.*, p. 43. (Two tributary dams, in contrast, will reduce it by $1,198,000. *Ibid.*, p. 43.)

[51] Feasibility Report, *op. cit.*, p. 12.

wholly incidental to the irrigation purpose of Friant Dam.

It may be that this commerce-flood-protection would be sufficient to justify the project. But if considered without regard to the other sources of federal reclamation power, such as public lands and general welfare, the case would be a closer one than any yet decided. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 528-534. However this may be, the issue here is the quite different one of the compensability of a taking of navigable waters for resale for irrigation purposes when there is some wholly incidental and trivial flood control benefit to commerce. We have found no authoritative decision,[52] but the issue seems clear enough on principle.

It is settled that the Government is not liable when an irrigation project produces an unintended injury, through raising the water level. *John Horstmann Co.* v. *United States*, 257 U. S. 138.[53] It is settled that the Government is not liable when a navigation project produces consequential and unintended injuries, however foreseeable, through the changed regimen of the river. *Gibson* v. *United States*, 166 U. S. 269; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Com.*, 241 U. S. 351; *Danforth* v. *United States*, 308 U. S. 271, 286-287; *United States* v. *Willow River Co.*, 324 U. S. 499, 511.[54] Conversely, when the Government intends to take water for purposes of re-

[52] *Cf. Pike Rapids Power Co.* v. *Minneapolis St. P. & S. S. M. R. Co.*, 99 F. 2d 902, 910-911 (C. C. A. 8).

[53] It is, also, settled that an unintended taking of riparian rights does not afford ground for a Tucker Act suit for just compensation. *Tempel* v. *United States*, 248 U. S. 121, 129-131.

[54] Compare *United States* v. *Archer*, 241 U. S. 119, where the Court remanded for more precise findings, *inter alia*, as to the causal relation between the dyke and the flooding and the predictability of its effects. 241 U. S. at 129, 131-132. (The resulting judgment for Archer, 53 C. Cls. 405, was affirmed by an equally divided Court, 251 U. S. 548.)

sale, its liability should not be defeated because there arose some trivial and consequential benefits to commerce or navigation. Liability depends upon the immediate and intended objective of the Government, and not on remote and consequential injuries or benefits.[55]

3. **An Irrigation Taking Must Be Paid For.** The respondents' water rights, then, in law as well as in fact have been taken from them for irrigation purposes and not for navigation or commerce purposes. See *Kansas* v. *Colorado*, 206 U. S. 46, 85-86; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 425. It follows without more that the Government "may not arbitrarily destroy or impair the rights of riparian owners" by a taking "which has no real or substantial relation to the control of navigation." *United States* v. *River Rouge Imp. Co.*, 269 U. S. 411, 419.[56]

Such was the decision in *International Paper Co.* v. *United States*, 282 U. S. 399. There, in exercise of its war powers, the United States ordered the power company at Niagara Falls to use the water which under conveyance and lease ordinarily flowed past to the paper mill. Mr. Justice Holmes brushed aside an argument based upon the powers of Congress over navigable waters because "the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end" (282 U. S. at 407). So, here, the Secretary of the Interior did not seek to pervert the navigation powers of the Government, but both recognized and paid for the water rights here in question, which he was taking for resale, and not to ad-

[55] The only exception to this rule appears to be the case where the property claimed to have been taken has in fact been benefited by the Government's work in its totality. *United States* v. *Sponenbarger*, 308 U. S. 256. This obviously is not the case here.

[56] See, also, the safeguarding language in the cases denying compensability, that the work be that having, e. g., "some positive relation" to the navigation end. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Arizona* v. *California*, 283 U. S. 423, 455-456; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *United States* v. *Willow River Co.*, 324 U. S. 499, 510.

vance the federal interests in navigation or commerce. See, also, *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63; *United States* v. *412.715 Acres of Land*, 53 F. Supp. 143, 148-149 (N. D. Cal.); *Federal Eminent Domain*, sec. 970.

It seems, accordingly, to be clear enough that the Government gains no immunity because the waters it takes from the respondents to sell to others happen to be navigable.

IV

RESPONDENTS' WATER RIGHTS ARE RIPARIAN RIGHTS, VALID AND PROTECTED BY STATE LAW

The Solicitor General presses upon this Court two issues of state law, each pointing to the conclusion that respondents have no valid water rights under state law and cannot, therefore, recover from the United States for their taking. Each contention is unfounded, and neither requires very extended treatment.

A. State Law Recognizes and Protects Respondents' Riparian Rights to Overflow Waters of the San Joaquin

1. **The Vested Right.** The Solicitor General does not dispute the fact that under the earlier California cases the respondents have a fully vested and protected riparian right to the annual overflow waters of the San Joaquin River. This was squarely decided with respect to the very right to flood-water overflow from the San Joaquin in *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, 252 Pac. 607, cert. dismissed, 275 U. S. 486. It has often been decided with respect to riparian rights indistinguishable from those of the respondents; "this court has invariably and consistently held that waters flowing during periods of high water were a part of the natural flow of the stream and could not be classified as either

unusual, extraordinary or unexpected." *Chowchilla Farms Inc.* v. *Martin*, 219 Cal. 1, 33, 25 P. 2d 435. See *Miller & Lux* v. *Madera Canal etc. Co.*, 155 Cal. 59, 99 Pac. 502; *Piper* v. *Hawley*, 179 Cal. 10, 17, 175 Pac. 417; *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 1007-1008.

2. The 1928 Amendment. The Government urges that the 1928 amendment to the California constitution altered this result. That amendment added Article XIV, Sec. 3 of the State Constitution, which provides:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *Provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

This Court is spared the necessity of applying the bare text of this provision, which has its evident ambiguities, to the facts of this case. The California decisions under this amendment are not crystal clear on all issues, but they do show that respondents' rights remain protected after as well as before this amendment. The 1928 amendment has been applied by the California courts to accomplish several important ends, but they have at the same time made plain that it did not serve to abrogate sustantial rights vested prior to its adoption.

The doctrine of beneficial use, before 1928, had no application to a riparian owner who objected to a diversion by an appropriator; the 1928 amendment, however, eliminated the right of a riparian owner to block an appropriation which would invade his technical rights to an unimpaired flow but would do him no practical harm. *Gin S. Chow* v. *City of Santa Barbara*, 217 Cal. 673, 695-700, 705-706, 22 P. 2d 5; *Meridian Ltd.* v. *San Francisco*, 13 Cal. 2d 424, 447, 451, 90 P. 2d 537; *City of Los Angeles* v. *Glendale*, 23 Cal. 2d 68, 75, 142 P. 2d 289. The wasteful use condemned by the Constiution "was the use of water by a riparian owner under an asserted, and therefore protected right to compel the waters of the stream, without any benefit to himself, to flow to a lower level and on to the sea when otherwise a beneficial use could be made of the same." *Meridian, Ltd.* v. *San Francisco, supra*, 447. As the Court said in *Peabody* v. *City of Vallejo*,[37] 2 Cal. 2d 351, 374, 40 P. 2d 486:

> "The preferential and paramount rights of the riparian owner, the owner of an underground and perco-

[37] The Government places great reliance on the *Peabody* case. We do not, in view of the language quoted in the text nor indeed of that last quoted by the Government (Br. 53), see how it aids their case. The cause was remanded to the trial court to determine whether the riparian owners had lost any substantial benefit, with directions to provide a physical solution or damages if they had. The reference to flood and freshet waters, quoted by the Government, is to waters which never returned to the channel.

lating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable."

Again, the 1928 amendment eliminated the earlier rule that the riparian owner had power by injunction absolutely to prevent a much more beneficial appropriation of the water. But it did not deprive the riparian owner of his right to a physical solution or to compensation if the subsequent appropriation damaged a riparian right of the sort previously recognized. *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 374-375, 380, 40 P. 2d 486; *City of Lodi* v. *East Bay Municipal Utility Dist.*, 7 Cal. 2d 316, 337-341, 60 P. 2d 439; *Hillside Water Co.* v. *Los Angeles*, 10 Cal. 2d 677, 686-688, 76 P. 2d 681. Each of these cases dealt with the rights of the overlying landowner to maintenance of the underground water tables, which in California is the equivalent of a riparian right. *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 986. Each of the cases arose with respect to a comparatively "wasteful" use of surface water to maintain the water table.[38] Each recognized the continued validity of the *Herminghaus* rule so far as it fixed the character and compensability of riparian rights. Each, however,

[38] The Government's comment on the *Lodi* case is that the court directed a reasonable physical solution (Br. 55). So it did, but the important thing here is that the right which was protected required "tremendous releases" which "after they serve the purpose of forcing a relatively small quantity of water into the surrounding underground water table, for the most part, waste into the sea" (7 Cal. 2d at 339).

refused to allow the overlying owner entirely to block the challenged appropriation, as he could have done prior to 1928. Instead, each required the appropriator to afford a physical solution, i. e., replacement water, to the overlying user which put the water to a public use, or make compensation to the private overlying water user for his resulting injury.

The 1928 amendment, in short, eliminated the protection given merely technical and non-beneficial uses by the riparian owner and, even in the case of beneficial uses, permitted an appropriation for a higher use upon furnishing a physical solution to the public riparian owner and compensation to a private riparian owner. "The effect of this amendment has been to modify the long standing riparian doctrine announced in the above cases, and the cases cited therein, and to apply by constitutional mandate the doctrine of reasonable use between riparian owners and appropriators and between overlying owners and appropriators * * *. The new doctrine not only protects the actual reasonable beneficial uses of the riparian but also the prospective reasonable beneficial uses of the riparian." *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* 3 Cal. 2d 489, 524-525, 45 P. 2d 972. It did not, however, in any way destroy or make non-compensable prior riparian rights which were of a real as opposed to only a technical value. The 1928 amendment gives the riparian owner full protection in "the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes." *Meridian, Ltd.* v. *San Francisco*, 13 Cal. 2d 424, 445, 90 P. 2d 537. The riparian owner must show injury before he can complain of an upstream storage of flood waters, "but such right of storage must necessarily be subordinate to all beneficial uses in the stream made in the exercise of prior appropriative rights." *Id.* 449-450.[59]

[59] Weil, Fifty Years of Water Law, 50 Harv. L. R. 252, 275, points out that more extreme drafts of the 1928 amendment were watered down before enactment. His analysis of the California cases agrees with ours, and does not support that of the Government (pp. 284-290).

In *Chowchilla Farms, Inc.* v. *Martin*, 219 Cal. 1, 25 P. 2d 435, the court in 1933 held that the annual flood waters of the San Joaquin which were put to a beneficial use by the riparian owner could not be diverted by upstream appropriations. The opinion does not discuss the 1928 amendment but the court could not possibly have been unaware of its command. It had, indeed, only a few months before, on the basis of that amendment, denied corresponding protection to a riparian owner not in fact injured by the upstream diversion. *Gin S. Chow* v. *City of Santa Barbara*, 217 Cal. 673, 699-706, 22 P. 2d 5. In *Los Angeles Flood Control Dist.* v. *Abbot*, 24 Cal. App. (2d) 728, 736-737, 76 P. 2d 188, moreover, the court held compensation due for a post-1928 diversion of seasonal flood waters which had for many years deposited merchantable gravel in front of Abbot's lands just before the waters reached the sea; it would follow *a fortiori* that the San Joaquin overflow waters, irrigating the uplands and returning to the river, is a non-wasteful and protected riparian right.

Finally, the very rights here in issue have been fully adjudicated in the California courts, after the 1928 amendment, and have been declared valid riparian rights. *Miller & Lux, Inc.* v. *Madera Irrigation Dist.* (decree Jan. 26, 1933); *San Joaquin & Kings River Canal* v. *Madera Irrigation District; San Luis Canal Co.* v. *Madera Irr. Dist.* (both decisions Dec. 31, 1932) (R. 79-81). These decrees would seem in themselves to settle the nature and application of California law. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 177-180; see, also, *Six Companies* v. *Highway District*, 311 U. S. 180, 188; *West* v. *A. T. & T. Co.*, 311 U. S. 223, 236-238; cf. *King* v. *Order of Travelers*, 333 U. S. 153, 159-162.[60]

[60] The California decrees cited above seem clearly to fall more nearly within the rule of the *Field* case than that of the *King* case. *Field* held the federal court concluded by the decree of the New Jersey trial court of chancery; it had statewide jurisdiction, and its decrees were accessible and accorded the respect of *stare decisis*. The South Carolina Court of Common Pleas in the *King* case had a local jurisdiction, its decisions

3. The Facts Require Affirmance. Wholly apart from the settled California interpretation of the 1928 amendment, the Government cannot by any view prevail on the facts of these cases.

(a). The Government can escape payment for the seized right, under the 1928 amendment, only if it establishes that the annual enrichment of respondents' lands is accomplished by the "waste or unreasonable use or unreasonable method of use" of the water. This is a question of fact. The Court of Claims made no such finding.

As we read the somewhat refined rule as to the burden of proof under the 1928 amendment, the riparian owner in the ordinary case has the burden of showing that his use is not "wasteful," *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P. 2d 972, 991, and the subsequent appropriator thereafter has the burden of showing that his diversion will not injure the riparian owner, *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 381; *Tulare* case, *supra*, 991. Since a "wasteful" use is simply one that does not benefit the riparian owner, *Meridian, Ltd.* v. *San Francisco*, 13 Cal. 2d, 424, 447, 90 P. 2d 537 (*supra*, p. 51), this means only that the riparian owner must show that the water actually benefits him, and thereafter the subsequent appropriator, if he is to be free to divert or store, must show that the riparian benefits will not be impaired.

Here the Court of Claims has found that the grassland absorbed about one-acre foot of water each year; that the

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were available only by accident, and other state courts felt wholly free to reexamine their results. The California Superior Court decisions are treated with respect in California and, certainly with regard to water rights, are the result of protracted litigation, and are known and accessible to the state bar generally. "The Superior Courts of the State of California while located and functioning in the several counties of the state, are not local or county courts, but constitute a system of state courts, being vested with and exercising the judicial power of the state under the express terms of Section 1 of Article VI of the Constitution." *Sacramento & San Joaquin Drainage Dist.* v. *Superior Court*, 196 Cal. 414, 432, 238 Pac. 687.

excess over this amount returned to the river; that the absorbed water was well below the optimum of 3-acre-feet; and that the absorbed water promoted the growth of grass and other forage (R. 88). It has further found that the Government's taking will wholly eliminate these benefits and that the resulting injury amounts to $9 an acre. It is wholly clear that the Government has not borne its burden of proof.

(b) It is, finally, to be noted that the Government's argument on this score is subject to much the same disabilities as its constitutional argument. Both the administrative and the Congressional authorization of the project contemplated that the riparian rights to uncontrolled grasslands should be purchased; they have in fact been purchased, at a large cost, without denial of liability until this litigation began; and the purchases have been disclosed to and ratified by Congress (see *supra*, pp. 27-35). Even if there were doubt as to the law of California, the Congress and the Secretary of Interior certainly have power to resolve that doubt in favor of fair dealing to the riparian grassland owners who lose their water in order that the Government may sell it for use on non-riparian crop lands. And respondents, here, as in the navigation argument pressed by the Solicitor General, may with some justice complain that the same Government which has agreed to pay Miller & Lux $2,450,000 for water rights which include the identical rights to overflow waters here in issue should not tell the rightful owners that this was a wasteful and therefore a noncompensable right.

B. The Respondents in Nos. 299 and 301 Have Riparian Rights Which Miller & Lux Cannot Sell

The deeds from Miller & Lux, Inc., to Gerlach Live Stock Co. and to Martin Erreca [61] provided (R. 112, 126):

[61] As noted above, *amici curiae* have no interest in the facts of the other four cases.

> This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the Grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs, and assigns, to the extent herein provided.

The Bureau of Reclamation partially accepted the contention of Miller & Lux that it had the right to sell the riparian rights to these lands, and included them among those for which the payment of $2,450,000 was made; it reserved $511,350 in escrow, however, for reimbursement against the event the grantees should be able to establish their claim to the ownership of the water rights (R. 96-97).

1. The Text of the Clause. It is a fair inference from this record that the Miller & Lux water rights clauses were carefully drawn and that choice among the alternatives was or could be a matter of bargaining.[62] It is, therefore, significant that the clauses, simply as a matter of terminology, are in two respects inconsistent with the Government's position.

[62] This record contains four examples of the Miller & Lux water rights clauses. One, that to Potter (R. 106), very plainly protects the grantee against a sale of his riparian rights by Miller & Lux. Two others, that to *Erreca et. al.* (cert. den. No. 238, this Term) and that refused by Potter (R. 107, 121) very plainly attempt to reserve such a power to Miller & Lux. In result, neither party can profitably base an argument upon a comparison of the deeds here discussed with the three other forms shown by this record.

(a) The draftsman, whenever he mentioned the grantee, was careful to include "his heirs, and assigns." If the water rights reserved to the grantor had been intended to include the unusual power to sell the grantee's water for the grantor's own account, one would expect the inclusion of the "assigns" of the grantor. Instead, the rights run to "the Grantor, its successors, subsidiary, and affiliated companies." This looks to use, not to sale; and strongly suggests that the right of transfer was only among the Miller & Lux group of corporations.

(b) The clause carefully distinguishes between "the *riparian* rights of the land herein conveyed" and "the *water* rights of the Grantor." It reserves to the Grantor the right to "use, enjoy and transfer said *water* rights * * * without let or hindrance from the grantee." There is no reserved power to use or transfer "the *riparian* rights" of the grantee. The clause, instead, did no more than it purported to do, which was to estop the grantee from objecting as he might otherwise have done, to the use by Miller & Lux of its own water on lands or by methods which might otherwise be subject to riparian objection.

2. **The Legal Background**. The right to use water on riparian lands is, by California law, more than an easement or an appurtenance; it is a part and parcel of the land. *Lux* v. *Haggin*, 69 Cal. 255, 391-394, 4 Pac. 919; *Irrigation Dist.* v. *Mt. Shasta P. Corp.*, 202 Cal. 56, 65, 259 Pac. 444. The riparian owner has, nevertheless, a limited power to convey the water rights separately from the land for use on either riparian or nonriparian lands. *Yacco* v. *Conroy*, 104 Cal. 468, 38 Pac. 107; *Holmes* v. *Nay*, 186 Cal. 231, 238, 199 Pac. 325; *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 263 Pac. 318, 322; *Forest Lakes Water Co.* v. *Santa Cruz Land Co.*, 98 Cal. App. 489, 277 Pac. 172. That limited power may take either of two forms. The riparian owner in selling a part of his land which, after deed, will not be contiguous to the stream has power to convey with it the corresponding portion of its for-

merly riparian water, and such a conveyance will bind all other riparian owners. *Miller & Lux Inc.* v. *J. G. Jones Co.*, 179 Cal. 689, 178 Pac. 716. The riparian owner may also sell his water rights for use either by another riparian owner or on nonriparian lands, but this conveyance operates only as an estoppel against the grantor and his privies, and does not diminish or alter the rights of the other riparian owners. See *Duckworth* v. *Watsonville Etc. Co.*, 150 Cal. 520, 529, 89 Pac. 338; *Duckworth* v. *McKinley*, 158 Cal. 206, 110 Pac. 927; *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 263 Pac. 318, 322.

Against this background, the clause in issue becomes rather clearer. Miller & Lux did not sell respondents their lands stripped of their riparian rights; the clause expressly states that it is not to be construed as an extinguishment of those rights. It did obtain, however, an estoppel running against the owners of these lands preventing any objection to storage, diversions or uses by Miller & Lux of its own water rights, and it obtained an estoppel against the owners of these riparian lands if Miller & Lux wished to sell its own water for use by third parties on nonriparian lands. These were, or might be, important advantages. But they are wholly unrelated to the power claimed by Miller & Lux to sell the water rights twice, once to respondents and then to the Government.

The Government's construction of the clause is, in truth, an impossibility under the law of California. As the respondents' riparian rights are not extinguished, they remain a part and parcel of the land. Miller & Lux had no power, as against riparian owners generally, to sell even its own riparian rights for use on nonriparian lands. By this clause, respondents are estopped from objecting should Miller & Lux choose to do this. But nothing in the clause suggests that Miller & Lux were attempting to reserve the power to sell riparian rights which it no longer had, which were not used on any lands which it owned, and which were a part and parcel of lands owned by others. Since the

law knows no such thing as a riparian right in the air, unconnected with the use of the water on riparian lands, it is hard to see how any language could serve to sever a riparian right from the lands of which it is a part and on which the water is used, so as to give one who did not own the land a right at will to sell it for use on nonriparian lands.

Most certainly, if any result so extraordinary had been intended the parties would have used words to make it plain. There is a presumption against the severance of water from the land on which it is used. *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539. That presumption applies with treble force here. The clause as it is written has a sensible purpose when construed to ensure the grantor's freedom to make a different use of its own water. It would, under the Government's construction, result in the respondents having purchased the fee title to the land but only a license, terminable at will, to the water which is necessary to its productivity. The clause, as the Solicitor General construes it, would be an effort by Miller & Lux to acquire a floating riparian right, unconnected with any land, which it could use or sell at any time in the indefinite future. Whatever the legal effect of a clause which in fact said what the Government urges this to mean,[63] such extraordinary consequences are surely not to be visited upon these respondents, who were expressly assured that their riparian rights were not intended to be extinguished.

3. The Purpose of the Sale. The water rights clause, finally, reserves to Miller & Lux no power to transfer rights or to store water for diversion out of the San Joaquin River. But Miller & Lux undertook to sell to the United States respondents' riparian rights for the purpose not alone of "storage on the upper reaches of the San Joa-

[63] There are two clauses in this record (R. 107, 121), neither of which is before the Court for adjudication, which undertake to reach so extreme a result. We should suppose, under the California decisions cited above, that the grantees under such clauses would be estopped but not the other riparian owners.

quin River" but for the purpose of diversion entirely out of the San Joaquin River. This is a far different purpose, so far as the downstream users are concerned, than mere storage. The Erreca findings (R. 113) indicate that the grantee might not have been injured at all, had the flood water been merely stored for later release down the San Joaquin, and the Gerlach findings are not specific on this score (R. 127-128). The deed under no construction could be thought to reserve the right to Miller & Lux to divert, or to sell the right to divert, out of the San Joaquin altogether."[64] The Court of Claims, adopting this ground, found it unnecessary to consider the other difficulties petitioner must overcome to sustain its construction of this clause (R. 137-138).

V

THE DATE OF TAKING

A. The Alternative Dates

This litigation presents an unusually long span of time in which, according to one view or another, the date of taking may be fixed. The project was first authorized in 1935 (*supra*, p. 17), and the final and indisputable taking will probably not arise before the final completion of the Friant-Kern canal in 1950.[65] Any one of a number of dates within this 15 year period may, with greater or less plausibility, be selected as the most appropriate time at which to declare that the respondents' rights have been taken. These dates, with our summary comment, follow.

Authorization. The authorization on December 4, 1935, is not enough to amount to a taking before there has been any tangible injury or before any work has begun. *United*

[64] It is conceivable that some of the water diverted out of Millerton Lake may return to the San Joaquin (especially via the Kings River and Tulare Lake) but it is not suggested that any such downstream return would benefit the lands of the respondents.

[65] Feasibility Report, Central Valley Project, H. Doc. No. 146, 80th Cong., 1st Sess., pp. 18, 20, Table V opp. p. 22.

States v. Sponenbarger, 308 U. S. 256, 267-268; *Danforth v. United States*, 308 U. S. 271, 286; see *Bauman v. Ross*, 167 U. S. 548, 596-597; *Willink v. United States*, 240 U. S. 572.

Start of Construction. Construction of Friant Dam began on November 3, 1939 (R. 99). It was, thereafter, reasonably certain that the project would be carried through. There is respectable authority (in each case by way of assumption rather than holding) for the proposition that the landowner can bring suit as soon as the adopted plan has received the earnest of actual work under it. *Peabody v. United States*, 231 U. S. 530, 538; *Portsmouth Harbor Hotel Co. v. United States*, 260 U. S. 327, 329; *Hurley v. Kincaid*, 285 U. S. 95, 103-104. *Danforth* v. *United States*, 308 U. S. 271, 286-287, disposes of this alternative so far as start of the general project is concerned, but it leaves open the possibility that the taking is accomplished at the start of construction of the particular feature which will cause the compensable damage to the lands. That possibility remains open after *United States* v. *Dickinson*, 331 U. S. 745, 749, where the Court said, "we are not called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens." That decision is, however, a clear holding that the period of limitations does not being to run at this point, nor until the damage is complete.[66]

First Storage. The first substantial impoundment of the water occurred on October 20, 1941 (R. 100). The

[66] *Amici curiae* have concluded that the most reasonable of the alternative dates is the first storage for the purpose of diverting the San Joaquin waters to nonriparian lands and have, accordingly, filed suit for a taking as of February 21, 1944. They see no problem, under the *Dickinson* case, in the fact that their suit was filed more than six years after the date selected by the court below.

three-weeks impoundment did not in fact injure the respondents (*supra*, p. 7). The Court of Claims adopted this date as the latest date of taking (R. 141-145). The contract between the Government and Miller & Lux seems rather plainly to have contemplated this as the date of taking, for it puts the $511,350 in escrow against suits "initiated prior to the sixth anniversary after the initial storage or diversion" (R. 96). We know of no federal authority directly supporting the choice of this point of time, but — so far as it is directed to standing to bring suit or interest — consider it a wholly reasonable solution of the problem. It seems, further, to accord with the California rule (Rsp. Br. 29-31).

First Injury. The record does not show when the respondents' lands were or will be for the first time deprived of their overflow water. This date may have been in 1942, when the flood waters exceeded the capacity of the outlets (R. 101). It may very probably have been during the spring of 1944, in the course of the substantial impoundment necessary to raise the reservoir to the outlet of Madera Canal (R. 101). It may have been during any or all of the subsequent years in which Madera has been in operation. It may not occur until the impoundment for or the diversion into Friant-Kern Canal. If the date of first injury were fixed, there would be authority for accepting this date as that of the taking. Most of the older cases speak of the date of taking as the date of actual injury to or invasion of the land. See *Pumpelly* v. *Land Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445, 470; *United States* v. *Welch*, 217 U. S. 333, 338; *United States* v. *Grizzard*, 219 U. S. 180, 183; *United States* v. *Cress*, 243 U. S. 316, 327-328; *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Highsmith*, 255 U. S. 170. They were not, however, directly concerned with the date of taking. But in *Danforth* v. *United States*, 308 U. S. 271, 286, the Court in dealing with intermittent flooding seems to have accepted the date of the first actual injury as the time of taking.

Completion of Construction. Here construction will not be completed until 1950. Several of the cases fix the date of taking as the date the Government construction was completed. In *Jacobs* v. *United States*, 290 U. S. 13, 15, 18, it is not clear whether this was coincident with the actual injury. But in *Court of Marion County* v. *United States*, 53 C. Cls. 120, 145-150, and *Dooner* v. *United States*, 95 C. Cls. 392, 397, the court below applied the rule when the completion of the work preceded the actual damage; in *Marion County* the result was an alternative ground for barring the claim. In *United States* v. *Dickinson*, 331 U. S. 745, 748-749, the Court held that the period of limitation did not run against the owner, before his injury is complete, merely because construction of the project has been finished.

Completion of Injury. It is possible, if Friant-Kern were not completed until after the 1950 growing season, that there would be still another year before the last bit of respondents' water rights were taken. *United States* v. *Dickinson*, 331 U. S. 745, establishes that the period of limitations does not begin to run until after the injury to the land has been completed, and accordingly that suit will not be barred before 1956 or 1957, but carefully leaves open the time beginning with which suit can be brought.

B. The Dickinson Rule

The variety of possible dates of taking indicated above is graphic evidence of the wisdom of the rule in *United States* v. *Dickinson*, 331 U. S. 745.[67] There the Court said (pp. 747-749):

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[67] Dickinson's uplands were flooded by a Kanawha River dam, and he sued under the Tucker Act for just compensation. If his cause of action had accrued before April 1, 1937 (six years prior to suit) or before August 16, 1937 (when Dickinson bought the land; see 152 F. 2d at 866) his claim was barred. The dam had been authorized, construction had been started, and impoundment had begun prior to those dates; the lands had become partially submerged prior to the latter of the dates. The dam was completed 4 days after Dickinson acquired the land, and the full pool level was attained 13 months later. The Court in terms left open the question whether the owner *could* sue at an earlier time, and held he was not barred until the taking had been completed.

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken." The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy. • • •
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> • • • The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" — when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. • • • The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. • • •
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> When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. • • • we are fortified by the fact that the two lower courts reached the same conclusion on what is after all a practical matter and not a technical rule of law.

Under the *Dickinson* case the court below took an entirely reasonable date from which to compute interest. It is highly probable that the respondents' lands lost most or all of their market value, so far as these depended upon riparian rights, when the project was authorized in 1935. At all times since the start of construction in 1939, they have had whatever overflow water has in fact reached the lands only by sufferance, and on terms which forbade sale or long-term planning. And certainly the Government,

which bought these very water rights — although from the wrong person — in the summer of 1939, is hardly in a position to claim error or injustice when the court below awarded the rightful owner interest from the fall of 1941.

CONCLUSION

For the reasons set out above, we respectfully submit that the decision below should be affirmed.

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